No. 242

JOSEPH A. KIELAR,

Appellant,

vs.

HOWARD TEAGER YARRUM, *et al.*

Appellees.

Appeal from the United States District Court
for the District of New Jersey.

JOINT BRIEF FOR APPELLEES

Arthur J. Sills,
Attorney General of New Jersey,
Attorney for Appellees Lanigan
and Dempsey.
State House Annex,
Trenton, New Jersey.

Allen B. Hannum,
First Assistant Attorney General,
Of Counsel and on the Brief.

Stephen T. Urbaitis,
Deputy Attorney General,
Of Counsel.

Nicholas T. Femenia,
Essex County Counsel,
Attorney for Appellees Lavery,
Hall of Records,
Newark, New Jersey.

William J. Brennan,
Assistant County Counsel,
Of Counsel.

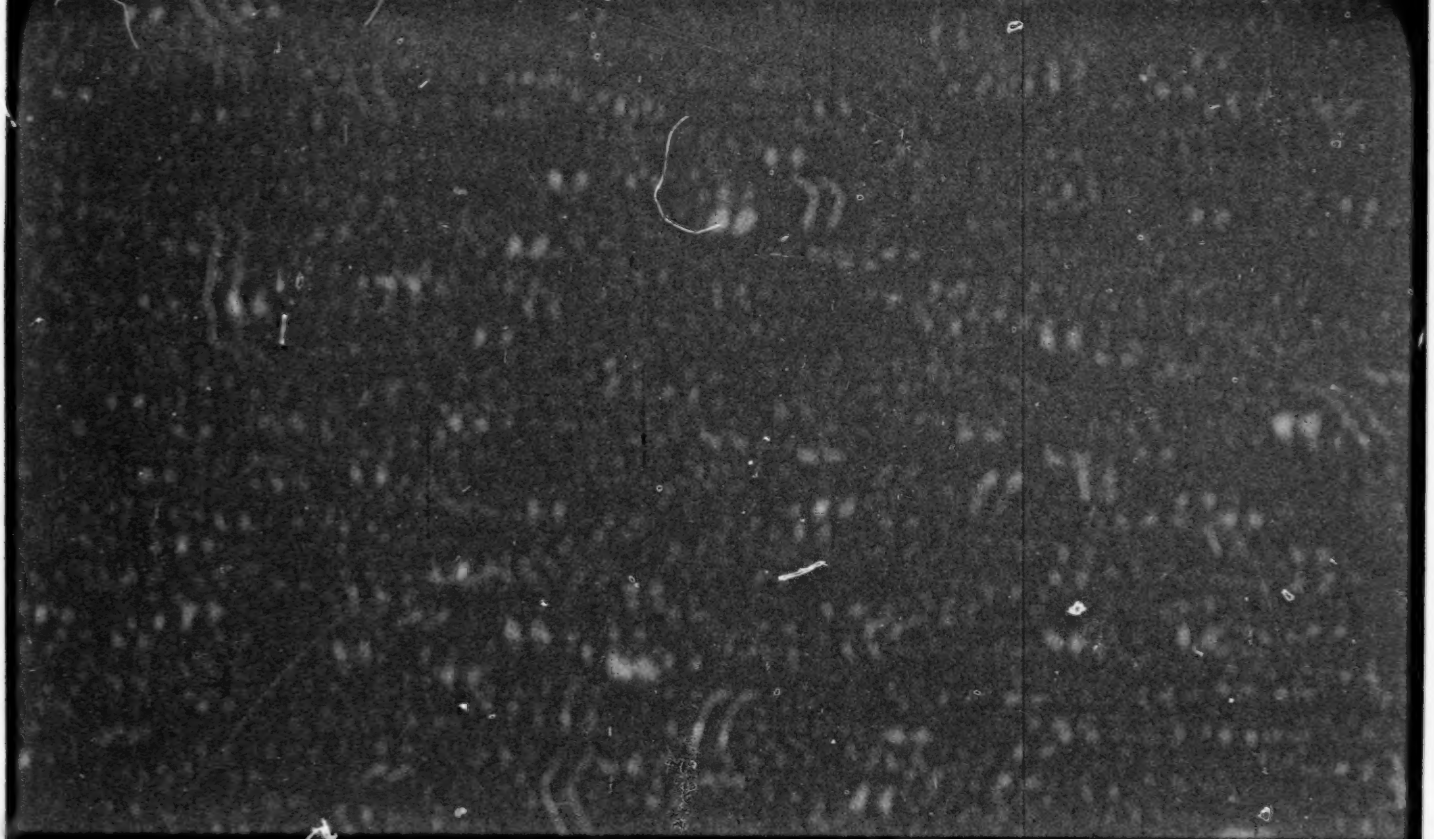

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT	4
SUMMARY OF ARGUMENT	10
ARGUMENT:	
Point I—The New Jersey statute, which enables an indigent defendant to receive a free transcript for the prosecution of a criminal appeal and which provides further for the reimbursement of the cost of such transcript from any institutional earnings of such defendant in the event his appeal is unsuccessful, furnishes prompt appellate review to indigents on the basis of substantial equality with other criminal defendants and does not deprive such persons of rights guaranteed under the United States Constitution	13
Point II—The reimbursement provision of the New Jersey statute, which entails the assessment against any institutional earnings of a defendant for the costs of a transcript previously furnished free of charge in the event his appeal from the criminal conviction is unsuccessful, is neither discriminatory in its overall application nor in its application to the appellant	37
CONCLUSION	47

PAGE

Cases Cited

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96 38

Bloomfield Bd. of Health v. Forest Hill Terrace, Inc., 66 N. J. Super. 522, 169 A. 2d 522 (Cty. Ct. 1961) 35

Brown v. Jamesburg State Home for Boys, 60 N. J. Super. 445, 158 A. 2d 123 (1960)..... 29

Burns v. State of Ohio, 360 U. S. 252 (1959)..... 25

Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1 (7th Cir. 1949)..... 34

City of Miami v. Murphy, 136 So. 2d 825 (Fla. Sup. Ct. 1962)..... 34

Cooke v. Tramburg, 43 N. J. 514, 205 A. 2d 889 (1964) 30

Daniel v. Daniel, 116 Wash. 82, 198 Pac. 728 (1921).. 34

Draper v. State of Washington, 372 U. S. 487 (1963).20, 22, 23, 31, 33

Douglas v. California, 372 U. S. 353 (1963)..... 39

Douglas v. Green, 363 U. S. 192 (1960).....26, 27

Edelman v. California, 344 U. S. 357 (1953)..... 43

Eskridge v. Wasington State Board of Prison T. & P., 357 U. S. 214 (1956).....18, 21, 22, 31

Gleckman v. United States, 80 F. R. D. 394 (8th Cir. 1935) 34

Griffin v. Illinois, 351 U. S. 12 (1956)....13, 15-17, 21-25, 27, 31, 33, 41

Hardy v. United States, 375 U. S. 277 (1963).....21, 23, 31

PAGE

In re Caruso, 18 N. J. 26 (1955) 35

In re Lee, 64 Okla. 310, 168 Pac. 53 (1917) 34

Kotch v. Pilot Commissioners, 330 U. S. 552, 556 (1947) 38

Lane v. Brown, 372 U. S. 477 (1963) 21

McKane v. Durston, 153 U. S. 684 15

Midler v. Heinowitz, 10 N. J. 123, 89 A. 2d 458 (1952) 45

Moss v. Hornig, 314 F. 2d 89 (2d Cir. 1963) 44

Norwell v. State of Illinois, 373 U. S. 420 (1963) 45

Oyler v. Boles, 368 U. S. 448 (1961) 44

Perkins v. Cingliano, 296 F. 2d 567 (4th Cir. 1961) .. 34

Ready v. Ready, 33 Ill. App. 2d 145, 178 N. E. 2d 650 (Ill. App. Ct. 1962) 34

Rinaldi v. New Jersey, 371 U. S. 847 (1962) 6

Scott v. City of Hobbs, 69 N. W. 330, 366 P. 2d 854 (1961) 29

Shain v. Idaho State Penitentiary, 77 Idaho 292, 291 P. 2d 870 (1955) 29

Snowden v. Hughes, 321 U. S. 1 (1943) 41, 44

Smith v. Bennett, 365 U. S. 708 (1961) 26, 27

State v. Cynkowski, 10 N. J. 571, 575, 92 A. 2d 782 (1952) 45

State v. Frato, 168 O. 281, 154 N. E. 2d 432 (1958) .. 35

State v. Hillebrandt, 244 La. 742, 154 So. 2d 384 (1963) 34

PAGE

State v. Welch, 46 N. J. 57, 214 A. 2d 857 (1957).....44, 46

State Board of Corrections v. Hays, 190 Ky. 147, 227 S. W. 282 (1921)..... 29

Woods v. Rhay, 54 Wash. 2d 36, 44-45, 338 P. 2d 332, 337 (1959).....19, 20

United State Constitution Cited

8th Amend..... 8, 9

14 Amend.....2, 4, 8, 10, 12, 14, 18, 36, 46

New Jersey Constitution Cited

Article VI, Section V 16

Article VI, Section V, par. 1(c) 45

Statutes Cited

N.J.S.A. 2A:152-17 .....2, 6, 10, 17-18, 23, 28, 36, 46, 47

N.J.S.A. 2A:152-18 .....3, 4, 7, 13, 24, 30, 36, 37

N.J.S.A. 2A:152-19 ..... 3, 36

N.J.S.A. 22A:1-1 et seq..... 35

N.J.S.A. 30:4-92 .....28, 29

N.J.S.A. 30:4-140 29

Ohio Code Ann., §2301.24 35

28 U.S.C. §1918, 62 Stat. 955..... 34

28 U.S.C.A. §2281 8

28 U.S.C.A. §2284 ..... 4, 9

42 U.S.C.A. §1983 8

Virginia Code, §17.301 35

PAGE

Rules Cited

R.R. 1:2-4 16

R.R. 1:2-7 17

R.R. 2:2-1 16

R.R. 1:2-1(c) 17, 45

R.R. 2:12-2 16

R.R. 3:10-1 16

Other Authorities Cited

Annot., 65 ALR 2d 854 (1959) 33

Comment, Appellate Review for Indigent Criminal Defendants in the Federal Courts, 26 U. Chi. L. Rev. 454 (1959) 35

Legislation, 17 Vand. L. R. 1572 (1964) 34

Poverty and the Administration of Federal Criminal Justice, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963) 35

The Right to Nondiscriminatory Enforcement of the State Penal Laws, 61 Columbia L. Rev. 1103 (1961) 43

The Supreme Court Review, 1962 Term, 77 Harv. L. Rev. 62, 105 (1963) 21, 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 940

JOSEPH A. RINALDI,

Appellant,

v.

HOWARD YEAGER, Warden, A. L. DEMPSKY, Business Manager, N. J. State Prison, Trenton, N. J. and HARRY LERNER, Essex County Treasurer,

Appellees.

BRIEF FOR APPELLEES

Opinions Below

The opinions of the three-judge District Court for the District of New Jersey are reported at 238 F. Supp. 960 (R52-58) and 37 FRD 455 (R63-72).

Jurisdiction

This suit was instituted in the United States District Court for the District of New Jersey by Appellant, Joseph A. Rinaldi, an inmate at the New Jersey State Prison, under 42 U.S.C. §1983 against Appellees who are officials of the State of New Jersey and the County of Essex. The jurisdiction of this Court to review the decisions of the Court below by direct appeal is invoked under 28 U.S.C. §1253 and §2101(b).

Constitutional Provisions and Statutes Involved

There are involved in this appeal the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

There is involved New Jersey Laws 1956, c. 134, §§1, 2 and 3, referred to as N.J.S. 2A:152-17, 18 and 19, which provides as follows:

"N.J.S. 2A:152-17. *Payment of transcripts for indigent defendants in criminal cases*

Any person convicted of any crime may make application under oath to any judge of the County Court or Law Division of the Superior Court of the county where the venue was laid showing that a copy of the transcript of the record, testimony and proceedings at the trial is necessary for the filing of any application with the trial court, and that he is unable, by reason of poverty, to defray the expense of procuring the same, and any such judge may, being satisfied of the facts stated and of the sufficiency thereof, certify the expense thereof to the county treasurer, who shall thereupon pay such expense, the

amount thereof having been approved by the judge to whom such application was made. Where such person appeals to the Appellate Division of the Superior Court and copies of the transcript of the proceedings in the trial court are needed therefor he may make a similar application to such court which, being satisfied of the facts stated and the sufficiency thereof, may certify the expense and amount thereof to the county treasurer who shall thereupon pay such expense. L. 1956, c. 134, p. 555, §1.

"N.J.S. 2A:152-18. *Reimbursement*

The county treasurer shall file a notice of said payment and the amount thereof with the institution in which said person, upon whose application the transcript of the record was prepared, is confined, and, to the extent of the expense incurred, the county treasurer shall be reimbursed from any institutional earnings of such person, in the event that the application for relief is denied by the trial court or an appellate court. L. 1956, c. 134, p. 555, §2.

"N.J.S. 2A:152-19. *Effective date*

This act shall take effect January 1, 1957. L. 1956, c. 134, p. 556, §3."

Questions Presented

Whether a state statute, which enables a defendant to obtain a trial transcript without cost and without delay upon a showing of indigency and that the transcript is needed to prosecute an appeal from his criminal conviction and which further provides that the costs of the transcript shall be reimbursed from any institutional earnings

of such defendant in the event his appeal is unsuccessful, constitutes a denial of Due Process and Equal Protection under the Fourteenth Amendment and deprives such person of his constitutional right to a prompt and effective criminal review in a manner substantially in accord with the right of other defendants.

Whether a state statute, which requires reimbursement from the institutional earnings of a convicted defendant for the costs of a transcript previously furnished to him free of charge for the prosecution of a criminal appeal, constitutes invidious discrimination against such defendant under the Fourteenth Amendment because other classes of criminal defendants may not be subject to such reimbursement or because it appears that a few individual defendants have not been subjected to such reimbursement where there is an absence of any indication of deliberate, selective discrimination on the part of governmental authorities.

Statement

This is an appeal from two orders of a three-judge District Court for the District of New Jersey, appointed pursuant to 28 U.S.C.A. §2284, entered on February 18, 1965, and on May 17, 1965 (R59, 72). The orders cumulatively denied appellant's motion for summary judgment that the application of the New Jersey statute, N.J.S. 2A:152-18, which required that he reimburse the costs of a transcript utilized by him in an unsuccessful appeal from his criminal conviction, constituted a denial of his constitutional rights. A notice of appeal was filed with this Court on June 11, 1965 (R73). An order granting leave to proceed *in forma pauperis* and an order noting probable jurisdiction were entered on January 24, 1966 (R76).

Appellant, Joseph A. Rinaldi, is presently confined as an inmate in the New Jersey State Prison as a result of two separate convictions in May, 1959 and May, 1960 (R37). The appellant was convicted for assault with intent to kill and sentenced on May 20, 1959 in the Essex County Court to an aggregate term of 8 to 10 years imprisonment. The sentence was composed of 6 to 7 years on the first count of the indictment and a 2 to 3-year sentence on the second and third counts. Both of these sentences were to run concurrently (R37).

Rinaldi filed a petition dated September 11, 1959 in the Superior Court, Appellate Division, for leave to prosecute an appeal *in forma pauperis*. The petition was granted on September 23, 1959. Appellant also filed a petition in the Superior Court, Appellate Division, for a transcript of the proceedings in the trial court upon a showing that he was indigent and the transcript was needed for the appeal (R37). This petition was granted by an order of court dated December 14, 1959. The order provided that "the expense [of such transcript] is hereby certified to the Essex County Treasurer who shall pay such expense upon presentation of an appropriate voucher approved by the Court." (R40). The petitioner also signed a State Prison form which stated that he had been informed, in accordance with the New Jersey statute, that should he obtain a copy of the transcript and his conviction be affirmed, his institutional earnings would be withheld until the debt was paid (R42). Appellant's May 20, 1959 conviction was affirmed by the Superior Court, Appellate Division, on June 17, 1960 (R38).

While serving the sentence imposed under the May 20, 1959 conviction, appellant was convicted of a threat to take

life on May 5, 1960 on two new indictments in the Essex County Court and sentenced to a concurrent term of 5 to 10 years on each of the two indictments (R38). On June 13, 1960 appellant petitioned for leave to appeal *in forma pauperis* from the May 5, 1960 conviction (R38). This was granted on June 16, 1960 (R38). On June 21, 1960 he petitioned for a free transcript of the proceedings in the trial court. This was granted by the Superior Court, Appellate Division, on the same day (R38, 43). The order of the Superior Court, Appellate Division, specified in language identical to the order of December 14, 1959, that the expense be defrayed by the Essex County Treasurer and that the obligation of the appellant to reimburse the Essex County Treasurer be taken out of his institutional wages in the event his appeal were denied (R43, 44).

In November, 1960 appellant received a copy of the transcript of the proceedings in the trial court in order to aid him in the prosecution of his appeal *in forma pauperis* (R18). Appellant's appeal was found devoid of merit and his 1960 conviction affirmed on September 18, 1961 (R46). On October 16, 1961, Rinaldi petitioned the Superior Court, Appellate Division, for a rehearing which was denied on February 27, 1962 (R38). On March 5, 1962, appellant filed a petition for certification to the New Jersey Supreme Court which was denied on April 13, 1962 (R38). Appellant then filed a petition for a writ of certiorari to this Court which was denied on October 8, 1962. *Rinaldi* v. *New Jersey*, 371 U. S. 847 (1962) (R38).

In August, 1963 the Essex County Treasurer requested from the Essex County Prosecutor's Office a list of inmates who had appealed as indigents pursuant to N.J.S. 2A:152-17 *et seq.* and whose applications for relief had

been denied (R38). The names of 26 such inmates, including the appellant, were furnished on September 20, 1963 (R49). This information was supplied to enable the County Treasurer to collect the costs of transcripts used by the unsuccessful indigent defendants (R49). The Essex County Treasurer notified the State Prison authorities that the appellant's appeal for relief had been denied (R39). On November 13, 1963, a directive was issued by the State Prison authorities to withhold the institutional earnings of appellant in the amount of $215 to reimburse the Essex County Treasurer for the transcript ordered by the Superior Court, Appellate Division, on June 21, 1960 (R50).[1] The appellant was apprised that the payment for the transcript used in preparing his appeal *in forma pauperis* granted on June 16, 1960 would be deducted from his institutional wages and forwarded to the Essex County Treasurer (R39, 50).

On January 24, 1964 the appellant filed *pro se* a complaint in the United States District Court for the District of New Jersey for a declaratory judgment rendering N.J.S. 2A:152-18 unconstitutional and for injunctive relief to restrain Howard Yeager, Warden of the New Jersey State Prison, A. L. Dempsky, Business Manager of the New Jersey State Prison, and Harry Lerner, Essex County Treasurer, from deducting and receiving reimbursement for the

[1] There is nothing to indicate that the Essex County Treasurer requested reimbursement, or that the State Prison authorities required reimbursement, from the appellant's institutional wages to pay for the costs incurred by the County in furnishing the transcript ordered by the Superior Court, Appellate Division, on December 14, 1959 for appellant's unsuccessful appeal from his 1959 conviction.

cost of the transcript used on his appeal in the Superior Court, Appellate Division (R1). The appellant alleged that his civil rights had been violated pursuant to 42 U.S.C.A. §1983, and that he had been subjected to cruel and unusual punishment contrary to the Eighth Amendment to the United States Constitution, that he is being deprived of due process and equal protection of the law guaranteed by the Fourteenth Amendment. The defendants in their answers to the appellant's complaint alleged that a claim had not been stated upon which relief could be granted, that the acts complained of were done in their official capacity in compliance with the law, and that the court had no subject matter jurisdiction to pass on the merits of the appellant's complaint unless heard and determined by a three-judge court as required by 28 U.S.C.A. §2281 (R13, 15). Counsel was appointed to represent the appellant and a notice of motion for summary judgment was filed with the court (R17). Appellant made requests for admissions from the defendants, Howard Yeager, A. L. Dempsky, and Harry Lerner, which indicated that the reimbursement procedure was not invoked against eight inmates whose convictions had been affirmed on appeal (R23, 28). Of the foregoing inmates, only three had been convicted by the Essex County Prosecutor, and presumably their transcripts on appeal were paid for by the Essex County Treasurer. With respect to two of the Essex County prisoners, appellate proceedings were still pending (R34). With respect to the other defendants, who allegedly had not been subjected to the reimbursement procedures of the New Jersey law, their prosecutions were conducted by different County Prosecutors, and the costs of their transcripts were paid for by the counties involved, none of which was Essex County. The State Prison authorities apparently had no

final information concerning the position of these other counties with respect to reimbursement affecting four of these remaining prisoners (R35).

The appellant, in his affidavit in support of the motion for summary judgment, acknowledged that he had in fact obtained a transcript so as to effectively prepare an appeal *in forma pauperis*, that he had the benefit of its use for approximately one month and had returned it to the Essex County Clerk's Office (R18).[2] Appellant requested the relief demanded in the complaint on the ground that there was no genuine issue as to any material fact and that judgment be granted as a matter of law (R17). The notice of motion was supported by a stipulation of facts entered into by all the parties to this suit (R37).

A three-judge court was appointed to hear the motion for summary judgment pursuant to 28 U.S.C.A. §2284. Summary judgment for the appellant was denied on February 18, 1965 (R59). The reasons of the Court are set forth in its opinion (R52-58). The appellant moved to correct the judgment on the ground that his motion for summary judgment did not include his Eighth Amendment ground and that there was a controversy as to a material fact (R60-62). The motion to correct judgment was denied on May 17, 1965 (R72), for the reasons expressed in an accompanying opinion (R63-72).

---

[2] It is to be noted that at the time the transcript was returned, appellant had not, of course, reimbursed the full cost thereof. Moreover, there is no indication that the transcript is not available to appellant for use in any subsequent proceeding relating to his conviction.

Summary of Argument

The New Jersey statute, N.J.S. 2A:152-17 *et seq.*, provides for the furnishing of a free transcript to indigent defendants seeking relief in criminal proceedings, and, provides further, in appropriate circumstances, for the reimbursement of the costs therefor. It is a proper exercise of the State's power to administer its judicial system and to maintain and administer its penal institutions. The effectuation of these State policies are accomplished by the New Jersey statute in a reasonable manner which does not in any sense deny to indigent criminal defendants their substantial right to a prompt, adequate and effective review, and it does not violate any recognized constitutional rights or privileges.

It has been established that State and local authorities are not under a constitutional obligation to furnish appellate review from criminal convictions. The State of New Jersey does, however, provide judicial review of criminal convictions. If a state, as a matter of internal policy, does provide relief in criminal proceedings, it may not deprive, in purpose or effect, a criminal defendant of such relief solely because of his financial condition or state of indigency. Such a denial is concededly a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

While a state may not prevent an indigent criminal defendant from enjoying the same or substantially similar rights to secure relief that are furnished in general to all criminal defendants, a state may pursue reasonable policies in furnishing these judicial rights to indigent criminal defendants. Thus, a state may take into account the policy of discouraging abusive, nonmeritorious and frivolous appeals.

The New Jersey statute provides an indigent criminal defendant with substantially the same opportunity for prompt, adequate and effective review of the criminal proceedings resulting in his conviction as that which is available to a nonindigent. That portion of the New Jersey statute which requires an indigent, upon a proper verified application, to satisfy the court of his state of poverty and that a transcript, or portion thereof, is necessary for the prosecution of his application for relief or his appeal, is reasonable and constitutionally valid. It is designed, in sensible measure, to avoid the undue or unnecessary preparation of transcripts at public expense. Moreover, in the case *sub judice,* transcripts were in fact furnished promptly to the appellant without cost in order to enable him to prosecute appeals from his criminal convictions.

That portion of the New Jersey statute which entails the reimbursement of the costs of a transcript, previously furnished free of charge, from the institutional wages of a defendant-prisoner in the event his appeal or application for relief has been unsuccessful, is constitutionally valid and reasonable. This provision does not constitute or operate as a condition precedent to the exercise of the right of appeal, and it is not a financial barrier which is interposed as a precondition to the opportunity of an indigent defendant to pursue and secure appellate relief. It does not, therefore, penalize or discriminate against defendants solely because of their indigency. The reimbursement provision of the New Jersey statute in purpose and effect involves the general state policy, applicable to all litigants, criminal and civil, indigent and nonindigent, to discourage abusive use of the judicial machinery and senseless litigation. Moreover, as a matter of penal manage-

ment, the State of New Jersey does not recognize any absolute or vested right of a prisoner to receive compensation in the form of cash. Any institutional earnings are an aspect of the administration of the penal system and the handling of individual prisoners, which are matters committed to the discretion of the State and its prison authorities.

The New Jersey statute does not, on its face or in its application to the appellant herein, constitute invidious discrimination contrary to the Fourteenth Amendment to the United States Constitution. In providing for the reimbursement from institutional earnings of the costs of a transcript previously furnished free of charge to an indigent criminal defendant who is a prisoner, the statute effectuates reasonable State policy and does not constitute arbitrary, unreasonable or capricious classification. There is no constitutional requirement that, in pursuing its policy, the State must treat other classes of criminal defendants, such as those convicted of capital crimes, or paroled prisoners and the like, in a manner identical to that accorded incarcerated defendants.

Finally, in its particular application, the appellant has suffered no invidious discrimination under the New Jersey statute. There are no facts from which an inference can be drawn that the State of New Jersey or its political subdivision of the County of Essex has pursued a policy of intentional discrimination or that their actions reflect a pattern of deliberate, selective enforcement against appellant.

ARGUMENT

POINT I

The New Jersey statute, which enables an indigent defendant to receive a free transcript for the prosecution of a criminal appeal and which provides further for the reimbursement of the cost of such transcript from any institutional earnings of such defendant in the event his appeal is unsuccessful, furnishes prompt appellate review to indigents on the basis of substantial equality with other criminal defendants and does not deprive such persons of rights guaranteed under the United States Constitution.

A

The appellant, Joseph A. Rinaldi, argues that the New Jersey statute, specifically the reimbursement section thereof, L. 1956, c. 134, §2, N.J.S. 2A:152-18, constitutes a denial to him, as an indigent prisoner, of constitutional due process and equal protection in seeking appellate review (Ab7). In appellant's view, the New Jersey statute is contrary to a "pattern and policy" said to be reflected in various United States Supreme Court decisions, which it is asserted, prevent a fiancial condition, however slight, to be interposed upon an indigent's direct or indirect appeal of a criminal conviction (Ab17).

Appellant's position is predicated upon his evaluation of the various decisions including and emanating from *Griffin* v. *Illinois*, 351 U. S. 12 (1956) which treat of the rights of indigents accused of crime in seeking appellate review of criminal convictions.

In *Griffin*, the petitioners, convicted in Illinois of armed robbery, filed a motion in the trial court asking that a transcript of the proceedings be furnished without costs. They alleged that they were "poor persons" unable to pay the fees necessary to acquire the transcript and record needed to prosecute an appeal. Under the Illinois State procedures, in order to get full appellate review of alleged errors, it was necessary to furnish a bill of exceptions and this could not be accomplished without a stenographic transcript. Petitioners asserted, therefore, that failure to obtain a transcript would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Petitioners' application was denied, as was their subsequent petition under the Illinois Post-Conviction Hearing Act. It was conceded by the State and assumed, without apparent contradiction, by this Court that "the petitioners could not get appellate review of those [alleged trial] errors solely because they were too poor to buy a stenographic transcript." 351 U. S. at 16. It is in this context that the Court stated:

> "* * * In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. * * *
>
> * * *
>
> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review ac-

corded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g., McKane v. Durston, 153 U. S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. Citations omitted." 351 U. S. at 17-18.

And further:

"[T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Ibid.* at 19.

The *Griffin* case struck down, with complete justification, the Illinois procedure which required a criminal defendant "to pay costs in advance" of taking an appeal. Patently, and viewed realistically, this procedure, as applied to an impecunious defendant, deprived him of any right to take an appeal—a right which was readily available to defendants who had the financial ability to pay the normal costs. The Court did "not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The [Illinois] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants." 351 U. S. at 20. Thus, the essential question is whether the New Jersey procedures afford adequate appellate review to indigent defendants even though such procedures may not be identical to those afforded other defendants in that they involve a reimbursement feature applicable to defendants who have institutional earnings.

B

The State of New Jersey, it is to be emphasized, recognizes and accords full judicial review of criminal proceedings. The right of appeal by criminal defendants is secured by Art. VI, Sec. V, pars. 1, 2 and 3 of the New Jersey Constitution of 1947. The detailed mechanics of criminal appellate review are specified in the Rules of Court. Rule 1:2-4 provides for appeals in criminal causes. Criminal appeals from constitutional courts are taken to the Appellate Division of the Superior Court pursuant to R.R. 2:2-1 and 2:12-2, while appeals from courts of limited jurisdiction are taken to the county court, R.R. 3:10-1. Appeals by indigents are governed as well by the Rules of

Court, R.R. 1:2-7. In certain causes, such as capital cases, appeals are taken directly to the State Supreme Court. R.R. 1:2-1(c). In assessing the validity of N.J.S. 2A:152-17 *et seq.*, and particularly its reimbursement feature, as applied to an indigent, there must be a sensible appreciation that it is the policy of the State to provide wide appellate review of criminal proceedings.

The *Griffin* case involved the assessment of normal costs of litigation in connection with the processing of an appeal. This condition was imposed by the State and operated indirectly as a pre-condition to the taking of a criminal appeal. In several of the decisions following *Griffin*, however, there were involved, not financial conditions as such but other procedures or requirements which, as applied to indigents, could effectively frustrate their ability to obtain appellate review. These decisions have pertinency not only because they elaborate upon the meaning and scope of the *Griffin* principles but because they also apply to the provision of the New Jersey statute which requires an indigent to make an application for a free transcript.

P.L. 1956, c. 134, § 1, N.J.S. 2A:152-17, states:

> "Any person convicted of any crime may make application under oath to any judge of the County Court or Law Division of the Superior Court of the county where the venue was laid showing that a copy of the transcript of the record, testimony and proceedings at the trial is necessary for the filing of any application with the trial court, and that he is unable, by reason of poverty, to defray the expense of procuring the same, and any such judge may, being satisfied of the facts stated and of the

> sufficiency thereof, certify the expense thereof to the county treasurer, who shall thereupon pay such expense, the amount thereof having been approved by the judge to whom such application was made. Where such person appeals to the Appellate Division of the Superior Court and copies of the transcript of the proceedings in the trial court are needed therefor he may make a similar application to such court which, being satisfied of the facts stated and the sufficiency thereof, may certify the expense and amount thereof to the county treasurer who shall thereupon pay such expense."

The United States Supreme Court has considered this type of statutory requirement in several cases. In *Eskridge* v. *Washington State Board of Prison T. & P.*, 357 U. S. 214 (1958), the defendant, convicted of murder, made an application for a free transcript after filing his notice of appeal. The state law provided for the furnishing of a free transcript to an indigent if, in the trial judge's opinion, justice would thereby be promoted. The trial court determined that justice would not be promoted in the particular appeal by the furnishing of a free transcript, and the State Supreme Court affirmed the denial and at the same time dismissed the appeal for failure to file a transcript. The case came before the United States Supreme Court on a writ of habeas corpus charging that failure to furnish a free transcript was a violation of due process and equal protection. The United States Supreme Court stated that, while a state need not furnish a transcript in every case of indigency, "* * * a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate re-

view except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here. * * *" 357 U. S. at 216.

Thereafter, the State of Washington amended its procedures governing the furnishing of transcripts to indigent defendants. These rules called for an application to the trial judge for free transcripts and provided:

> "1. An indigent defendant in his motion for a free statement of facts must set forth:
>
> "a. The fact of his indigency
>
> "b. The errors which he claims were committed; and if it is claimed that the evidence is insufficient to justify the verdict, he shall specify with particularity in which respect he believes the evidence is lacking. (The allegations of error need not be expressed in any technical form but must clearly indicate what is intended).
>
> "2. If the state is of the opinion that the errors alleged can properly be presented on appeal without a transcript of all the testimony,
>
> "a. it may make a showing of what portion of the transcript will be adequate, or
>
> "b. if it believes that a narrative statement will be adequate, it must show that such a statement is or will be available to the defendant.
>
> "3. The trial court in disposing of an indigent's motion for a statement of facts at county expense shall enter findings of fact upon the following matters:
>
> "a. The defendant's indigency
>
> "b. Which of the errors, if any, are frivolous and the reasons why they are frivolous

"c. Whether a narrative form of statement of facts will be adequate to present the claimed errors for review and will be available to the defendant; and, if not

"d. What portion of the stenographic transcript will be necessary to effectuate the indigent's appeal.

"4. The trial court's disposition of the motion shall be by definitive order." *Woods* v. *Rhay,* 54 Wash. 2d 36, 44-45, 338 P. 2d 332, 337 (1959).

Application of this statute came before this Court in a later case, *Draper* v. *State of Washington,* 372 U. S. 487 (1963). In this case indigent petitioners were convicted of robbery. Acting *pro se* they filed timely notices of appeal from their convictions and motions for the trial judge to direct the furnishing of a free transcript. In the motions for the transcript it was alleged that there were various trial errors. The trial court, after hearing argument from both the assigned trial counsel and the petitioner Draper, denied the motion, without reciting any particular factual findings, on the basis that the alleged trial errors were patently frivolous, that there was overwhelming evidence of their guilt, and that the furnishing of a transcript would be a waste of public funds. 372 U. S. at 493. The Washington Supreme Court denied further review, finding that the trial judge had properly found the appeal to be frivolous. The ruling of the Washington Supreme Court, however, was made without reference to any stenographic record of the trial and was based solely on the record of the hearing on the motion for the transcript. The United States Supreme Court held that the State Courts' consideration of the assigned errors, without recourse to a sufficient trial record or any relevant portions of the rec-

ord or any relevant portions of the record of the trial, was not itself based upon a record of sufficient completeness and the denial of petitioners' request for a transcript constituted a violation of constitutional rights under the *Griffin* and *Eskridge* cases. It stated that the complete denial of any means for an indigent to secure adequate review of the merits of his appeal in an appellate court was impermissible when no such impediment to appellate review confronted nonindigents and that a State could not deny the request of these petitioners for review of the denial of the motion for a transcript without providing a record sufficiently complete to permit consideration of their claims. 372 U. S. at 497-498. See, *The Supreme Court, 1962 Term*, 77 Harv. L. Rev. 62, 105 (1963).

In similar fashion, the United States Supreme Court in *Lane* v. *Brown*, 372 U. S. 477 (1963) determined that an Indiana statute which required the approval of the Public Defender (*i.e.*, assigned counsel) as to whether or not a transcript was necessary in connection with the filing of an appeal by an indigent criminal defendant, and the denial of such a transcript because such authorization was not forthcoming, was unconstitutional. The decision of the Public Defender was not subject to judicial review. See also, *Hardy* v. *United States*, 375 U. S. 277 (1963) (under Federal statute an appeal *in forma pauperis* may be authorized except if the trial court certifies that "it is not taken in good faith.")

These cases establish firmly the proposition that an indigent's right to appeal, and his right to a transcript free of charge necessarily incidental to an appeal, cannot be encumbered or obstructed by the requirement that prior approval must be obtained therefor where there are no

adequate standards upon which such approval must be based or where there is an insufficient record upon which to evaluate the validity or soundness of the disapproval of the appeal or transcript request. This proposition was inferentially expressed in *Griffin* itself wherein the Court stated that there need not be a free transcript in every case of indigency where a defendant cannot buy it and that a state may find other means of affording adequate and effective appellate review to indigent defendants. 351 U. S. at 20. It was reiterated in *Eskridge* v. *Washington State Bd. etc., supra,* 357 U. S. at 216 and in *Draper* v. *State of Washington, supra,* 372 U. S. at 495.

The New Jersey statute which requires that an indigent make application under oath for a transcript and to show in that application that the transcript is "necessary" or "needed" for an appeal is valid on its face. There may be cases in which the application on the appeal envisaged by an indigent defendant does not require a transcript or does not require a full transcript. Thus transcripts might be unnecessary, or could be abbreviated, in appeals involving the validity of a statute, or sufficiency of an indictment, plea, arrest or arraignment or some other limited aspect of the proceedings. This was stressed in *Draper* v. *State of Washington, supra,* 372 U. S. at 495-496:

> "* * * [P]art or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be

provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted." Also *Griffin* v. *Illinois, supra*, 351 U. S. at 13.

It is also important to note that in each of the cases in which the United States Supreme Court determined that the application procedures of a state were unconstitutional, the transcript had in point of fact been denied to the indigent defendant. In the case *sub judice* the appellant Rinaldi obtained transcripts in both appeals which he took. There was no obstruction or obstacle thrown in the progress of his appeals. In the appeals from both of his convictions the New Jersey Court was satisfied with his showing of indigency and the need for the transcripts to prosecute the appeals. His applications were promptly received, reviewed and granted. In short, appellant's "access to a trial transcript [has been] * * * as complete as that of a paying defendant." *Hardy* v. *United States, supra*, 375 U. S. at 291 (Goldberg, *J.* concurring). For these very obvious reasons, therefore, the appellant makes no constitutional attack upon that section of the New Jersey statute, N.J.S. 2A:157-17, which requires an indigent defendant to apply for a transcript and to satisfy the court that such a transcript is necessary for the prosecution of his appeal or for the relief which he seeks. This provision, on its face and as applied to appellant, is constitutional.

C

Appellant concentrates his constitutional attack upon that section of the New Jersey statute which requires reimbursement from institutional earnings of the costs of a transcript in the event a defendant's appeal from his criminal conviction is unsuccessful.

N.J.S. 2A:152-18 provides:

> "The county treasurer shall file a notice of said payment and the amount thereof with the institution in which said person, upon whose application the transcript of the record was prepared, is confined, and, to the extent of the expense incurred, the county treasurer shall be reimbursed from any institutional earnings of such person, in the event that the application for relief is denied by the trial court or an appellate court."

It is clear that this statute does not impose upon a defendant any direct or fixed financial obligation as a precondition to the taking of an appeal or obtaining a transcript. Appellant asserts, however, that it operates as a financial consideration. In view of this assertion, the constitutional validity of this provision should be gauged in the context of those United States Supreme Court decisions dealing with state procedures imposing financial considerations incidental to the exercise of the right of appeal.

In the *Griffin* case, as noted, the Court was concerned with the application of a state procedure which operated as a financial condition. The procedure, quite simply, involved the practical necessity to obtain a transcript in order for an appellant to be able to secure full appellate

review of trial errors. Since a stenographic transcript could not be obtained without paying for it, obviously an indigent appellant could not get appellate review of trial errors. This the United States Supreme Court found to be constitutionally obnoxious and thus stated:

> "Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs *in advance* should be denied the right to plead not guilty or to defend themselves in court." (Emphasis supplied.) *Griffin* v. *Illinois, supra,* 351 U. S. at 17.

In *Burns* v. *State of Ohio,* 360 U. S. 252 (1959), the defendant was convicted of burglary and sentenced to life imprisonment. On an intermediate appeal the conviction was affirmed. He then filed a notice of appeal with the State Supreme Court but his papers were returned by the court clerk for failure to pay a filing fee of $20. It was conceded, on certiorari to this Court, that in effect the clerk's actions constituted a final judgment by the State Supreme Court. In defense of the filing fee requirement, it was urged that the appellate jurisdiction of the State Court was discretionary with respect to all criminal defendants. The Court rejected this argument on the ground that there was in this case a complete denial to the indigent defendant of any chance to appeal or to invoke the discretionary power of the court. 360 U. S. at 258.

The question as posed by the Court was "whether a State may constitutionally require that an indigent defendant in a criminal case pay a filing fee *before* permitting him to file a motion for leave to appeal in one of its

courts." (Emphasis supplied). 360 U. S. at 253. The Court held:

> "* * * The imposition by the State of *financial barriers* restricting the *availability* of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." (Emphasis supplied.) 360 U. S. at 258.

In *Douglas* v. *Green*, 363 U. S. 192 (1960), it was indicated that prepayment of docket fees, as applied to an indigent, made out a habeas corpus case of deprivation of constitutional rights to equal protection of the laws with respect to the prosecution of an appeal from a criminal conviction. Similarly, it was held in *Smith* v. *Bennett*, 365 U. S. 708 (1961), that a prepayment of a $4 filing fee could not be imposed as a pre-condition to the taking of an appeal from a criminal conviction by an indigent defendant. The Court stated:

> "* * * We hold that to interpose any financial condition *between* an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." (Emphasis supplied.) 365 U. S. at 709.

These decisions establish the proposition that a state may not prevent an indigent from prosecuting an appeal from his conviction by requiring the payment of any financial obligation as a condition of his right of review. The State may not take advantage of a defendant's penurious condition. Procedures which exact any payment for the right to utilize the judicial machinery clearly discriminate against indigent defendants solely on the basis of their financial inability to pay.

Discrimination or substantial differences in treatment attributable only to indigency have no basis in law or fact. As stated in *Griffin* v. *Illinois, supra*: "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (351 U. S. at 19). "Plainly, the ability to pay costs has no rational relationship to a defendant's guilt or innocence and cannot be used as an excuse to deprive a defendant of a fair trial." (*Id.* at 17-18).

The New Jersey statute requiring the reimbursement of costs of a transcript previously furnished in the prosecution of an unsuccessful appeal is not, either literally or in any other sense, "any financial consideration [interposed] between an indigent prisoner of the State and his exercise of a state right to sue for his liberty * * *." *Smith* v. *Bennett, supra*, 365 U. S. at 709. It does not entail the payment *"in advance"* of any costs or fees as a condition precedent to the taking of an appeal. *Griffin* v. *Illinois, supra*, 351 U. S. at 17. It does not constitute the prepayment of any court fees or costs before appellate review can be pursued and secured. *Douglas* v. *Green, supra.* It does not, therefore, fall within the proscription of the Supreme Court decisions invalidating financial obligations imposed by states upon indigent defendants as a precondition to their right to appeal.

Appellant argues, however, that the obligation to reimburse operates as some kind of a "psychological" barrier or obstacle to the taking of an appeal. Presumably, this is what is to be inferred from his assertion that he must "gamble his institutional wages in order to secure a transcript" and that "this fear would be particularly felt by a person already reduced to indigency" (Ab18). It is not

discernible from the record in this case that the appellant, Rinaldi, labored under any psychological handicap or sense of apprehension whatsoever. He availed himself of his right to appeal under the New Jersey laws in connection with two convictions against him. In each appeal he obtained a transcript promptly under N.J.S. 2A:152-17. In each he was well aware of the requirement to defray the costs of the transcripts in the event his appeals were unsuccessful. Only after the conclusion of his appeal from the second conviction, and the subsequent assessment of costs for the preparation of the transcript in that appeal, did the appellant make the assertion by inference, in this case, that he was deterred in the exercise of his right to appeal by a fear of losing his institutional earnings.

Appellant conceives that he is automatically entitled to compensation as a prisoner of the State of New Jersey and consequently cannot be subjected to the garnishment of these "wages" in connection with his criminal litigation. He does so far as to assert that the loss of his "daily wage" is "cruel and unusual punishment" (Ab19). It should be emphasized that the payment of penal wages, in the first instance, is a matter of discretion on the part of the state.[3] Any such compensation is basically a tool in

---

[3] The New Jersey Statute, New Jersey Laws of 1918, c. 147, as amended, N.J.S.A. 30:4-92 provides:

> "The inmates of all correctional and charitable, hospital, relief and training institutions within the jurisdiction of the State Board shall be employed in such productive occupations as are consistent with their health, strength and mental capacity and shall receive such compensation therefor as the State Board shall determine.

(*Footnote continued on following page*)

penal management. Under New Jersey law, compensation need not take the form of cash but may be considered as remission of sentence on account of good behavior. New Jersey Laws of 1918, c. 147, as amended, N.J.S.A. 30:4-140. Under New Jersey prison regulations and practices prisoners ordinarily receive credit on their sentences as well as nominal earnings.[4] There is, in short, no vested right in payment to a convict for his labor in whole or in part is a dispensation of legislative grace, a mere gratuity (and not a wage) that may be granted or withheld or withdrawn by the Legislature at any time. *State Board of Corrections* v. *Hays,* 190 Ky. 147, 227 S. W. 282 (1920); *Shain* v. *Idaho State Penitentiary,* 77 Idaho 292, 291 P. 2d 870 (1955); *cf. Scott* v. *City of Hobbs,* 69 N. M. 330, 366 P. 2d 854 (1961); *Brown* v. *Jamesburg State Home for Boys,* 60 N. J. Super. 445, 158 A. 2d 123 (Cty. Ct. 1960). In a variant context the

---

(Footnote continued from preceding page)

"Compensation for inmates of correctional institutions may be in the form of cash or remission of time from sentence or both. Such remission from the time of sentence shall not exceed 1 day for each 5 days of productive occupation, but remission granted under this section shall in no way affect deductions for good behavior or provided by law.

"In addition, all inmates classified as minimum security and who are considered sufficiently trustworthy to be employed in honor camps, farms or details, shall receive further remission of time from sentence at the rate of 3 days per month for the first year of such employment and 5 days per month for the second and each subsequent year of such employment."

[4] It is the fact, though not a matter of formal record, that appellant has continued to receive compensation in the form of remission from his sentence while subject to the reimbursement provisions of the New Jersey statute.

New Jersey Supreme Court, in *Cooke* v. *Tramburg*, 43 N. J. 514, 519, 205 A. 2d 889 (1964), elaborated upon the broad and flexible discretion vested in the State with respect to the treatment of convicts and its system of penology:

> "Although a convict, upon his admission to a prison, does not forfeit all his civil liberties, *Sewell* v. *Pegelow*, 291 F. 2d 196 (4 Cir. 1961); *Coffin* v. *Reichard*, 143 F. 2d 443, 155 A. L. R. 143 (6 Cir. 1944), cert. denied 325 U. S. 887, 65 S. Ct. 1568, 89 L. Ed. 2001 (1945), the discipline required to maintain the proper functioning of the prison community may curtail such liberties. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' *Price* v. *Johnston*, 334 U. S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356, 1369 (1948). See also, *McBride, supra; Sostre, supra; Brown* v. *McGinnis*, 10 N. Y. 2d 531, 225 N. Y. S. 2d 497, 180 N. E. 2d 791 (Ct. App. 1962). Compare *In re Ferguson*, 55 Cal. 2d 663, 12 Cal. Rpt. 753, 361 P. 2d 417 (Sup. Ct. 1961), cert. denied *Ferguson* v. *Heinze*, 368 U. S. 864, 82 S. Ct. 111, 7 L. Ed. 2d 61 (1961)." 205 A. 2d at 891-892.

It is in this context that the statute involved herein, and particularly N.J.S. 2A:152-18, must be assessed. The reimbursement provision reflects a State legislative policy, in connection with the handling and management of prisoners, that it is in the public interest to require that compensation to inmates should take the form of, or be

applied to, the payment of the costs of transcripts, previously furnished without charge.

In establishing the fundamental proposition that a State may not deny indigent defendants rights substantially equal to those accorded nonindigents, this Court has stressed the countervailing tenet that a State may pursue and effectuate its own conceptions of public policy in formulating and implementing procedures in criminal proceedings applicable to indigents. In *Griffin* v. *Illinois, supra,* 351 U. S. at 20, it was stated:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice."

Again, in *Eskridge* v. *Washington State Board, etc., supra,* 357 U. S. at 216: "We do not hold that a State must furnish a transcript in every case involving an indigent defendant". As stated by Justice Goldberg, concurring in *Hardy* v. *United States, supra,* 375 U. S. at 291: "This 'concept of "equal justice" does not confuse equality of treatment with identity of treatment' ". This principle was more fully expressed in *Draper* v. *State of Washington, supra,* 372 U. S. at 495-496:

"In considering whether petitioners here received an adequate appellate review, we reaffirm the principle, declared by the Court in Griffin, that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U. S., at 20, 76 St. Ct., at 591. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to

> waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review. * * *"

A state policy entitled to recognition is one which would prevent abuse of its judicial machinery. The decisions of this Court do not "militate[s] against a State's formulation and application of operatively nondiscriminatory rules to both indigents and nonindigents in order to guard against frivolous appeals." *Draper* v. *State of Washington, supra,* 372 U. S. at 499.

> "But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process." *Griffin* v. *Illinois, supra,* 351 U. S. at 24 (Frankfurter, *J*, concurring).

It has long been accepted that a state, in the administration of its judicial system, may impose the costs of litigation in a manner which will discourage nonmeritorious, frivolous, or abusive use of the judicial process. Annot., 65 A. L. R. 2d 854 (1959). Court costs are a part of the

burden of litigation and the imposition thereof upon a losing party does not deprive the litigant of his constitutional rights; such a requirement does not impermissibly intrude upon an acknowledged right of a litigant to obtain judicial relief. *E.g., Ready* v. *Ready*, 33 Ill. App. 2d 145, 178 N. E. 2d 650 (Ill. App. Ct. 1962) (civil action for accounting); *City of Miami* v. *Murphy*, 136 So. 2d 825 (Fla. Sup. Ct. 1962) (involving an action by municipality for damages); *Daniel* v. *Daniel*, 116 Wash. 82, 198 Pac. 728 (1921); *State* v. *Hillebrandt*, 244 La. 742, 154 So. 2d 384 (1963) (indigent not relieved from the prepayment of the costs for issuing subpoenaes; the dissenting opinion stated that the costs should not have been payable in advance but that the payment thereof should be deferred until the litigation was concluded and the costs would abide the result).

The assessment of costs against an unsuccessful litigant is not designed merely to reward the victor or to penalize the vanquished. There is no right to litigate entirely without expense or to impose upon the public the entire burden of maintaining the courts. *In re Lee*, 64 Okla. 310, 168 Pac. 53 (1917). It is a policy recognized in the administration of the federal judicial system. *Eg.*, 28 U. S. C. §1918, 62 Stat. 955; *Gleckman* v. *United States*, 80 F. R. D. 394 (8th Cir. 1935); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949); *Perkins* v. *Cingliano*, 296 F. 2d 567 (4th Cir. 1961), (applied to an indigent in a civil case). The policy of the taxation of costs against unsuccessful criminal defendants is adhered to generally by a majority of the jurisdictions. *Legislation*, 17 *Vand. L. R.* 1572 (1964).

The State of New Jersey has adhered to the generally accepted policy of assessing costs as a control over the

flow of litigation. New Jersey Statutes, 22A:1-1 *et seq.*; see, *In re Caruso*, 18 N. J. 26 (1955); *Bloomfield Bd. of Health* v. *Forest Hill Terrace, Inc.*, 66 N. J. Super. 522, 169 A. 2d 522 (Cty. Ct. 1961).

A state does not therefore have an absolute duty to eliminate all factors which might serve as a break upon the promiscuous use of its judicial system. See, *The Supreme Court Review, 1962 Term*, 77 Harv. L. Rev. 62, 105 (1963); comment, *Appellate Review for Indigent Criminal Defendants in the Federal Courts*, 26 U. Chi. L. Rev. 454 (1959); *Poverty and the Administration of Federal Criminal Justice, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (1963). The assessment of costs is such a factor and, if costs can be imposed upon *any* litigant in a manner which does not trench upon his ability to pursue relief within the judicial system, there should be no constitutional objection.

The New Jersey statute gives to the indigent appellant the right to have his case reviewed promptly and effectively. To the extent he may receive institutional earnings from the state for which he may be subsequently assessed in the event his appeal is unsuccessful, he is in a position not disimilar to many nonindigent defendants. *Cf. Virginia Code*, §17.301; Ohio Code Ann., §2301.24; *Cf. State* v. *Frato*, 168 O. 281, 154 N. E. 2d 432 (1958). It is not unfair to ask an indigent defendant who might be receiving institutional earnings to think before he acts. Comment, *Appellate Review for Indigent Criminal Defendants in the Federal Courts*, 26 U. Chi. L. Rev. 454 (1959). In fact, the appellant presently before this court has overcome this inhibition and has taken full advantage of the New Jersey statute.

In effect the appellant asserts his right to be free of the financial burden commonly attendant upon litigation. There is no reason, however, as a matter of constitutional law, why a defendant situated as the appellant herein cannot be called upon to share the costs of litigation, provided this obligation does not impede his right to appeal. Taxed costs are purposefully designed to make a litigant pause before resorting to the courts. Costs should, and do, act as a deterrent to litigation to all persons except, perhaps, the extremely affluent, the indifferent, or the reckless. There are relatively few persons who can afford to disregard or be unmindful of the expenses entailed in judicial proceedings. Assuredly there are many persons, not meeting the minimal tests of poverty or indigency; and there are many persons of modest means and small incomes, or with larger means but with correspondingly greater financial obligations, who must weigh carefully the cost involved before embarking on litigation. Indeed, the impact of litigation may fall with crushing weight upon an individual who falls within that vast middle ground between poverty and wealth. There is no reason, as a matter of policy or constitutional law, why the appellant should be afforded preferential treatment by being insulated from any of the burdens of the operation of the State's judicial system especially when the means for his assumption of this burden are furnished by the State itself.

It is respectfully submitted that the New Jersey statute, P.L. 1956, c. 134 §17 *et seq.*, N.J.S.A. 2A:152-17 *et seq.*, as applied to the appellant and on its face, is constitutional and does not violate the constitutional rights recognized by the Fourteenth Amendment.

POINT II

The reimbursement provision of the New Jersey statute, which entails the assessment against any institutional earnings of a defendant for the costs of a transcript previously furnished free of charge in the event his appeal from the criminal conviction is unsuccessful, is neither discriminatory in its overall application nor in its application to the appellant.

Appellant urges that N.J.S. 2A:152-18, the reimbursement feature of the New Jersey statute, is discriminatory in its overall application against unsuccessful indigent defendants and in its application to him personally. Initially, it is contended that the underlying policy of the statute as it applies to unsuccessful indigent prisoners is discriminatory since its application favors the following categories of litigious inmates: (1) the unsuccessful non-indigent appellant who continues to draw institutional wages; (2) the unsuccessful indigent appellant who has been released from prison before reimbursement is sought against him; (3) an indigent convicted of a capital offense, whose transcript the State provides free of charge; and (4) the successful indigent (Ab19-20). Secondly, the appellant contends that N.J.S. 2A:152-18, even if constitutional on its face, is applied in a discriminatory fashion (Ab19-20). With respect to the charge of personal discrimination, appellant contends that preferential treatment has been accorded (1) several unsuccessful indigent appellants from Essex County; (2) several unsuccessful indigent appellants from other counties in New Jersey; and (3) at least one unsuccessful indigent appellant who was paroled (Ab20).

A

The challenge that the inherent statutory policy posits an invidious discrimination against unsuccessful indigent prisoners can only be sustained if the classifications so created are arbitrary and irrational. It is beyond dispute that a state may regulate different classes of people in different ways so long as the classifications are relevant to the state's objectives.

> "The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. See *e.g., Tigner* v. *Texas,* 310 U. S. 141, 147. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For its is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 96, 106. This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives." *Kotch* v. *Pilot Commissioners,* 330 U. S. 552, 556 (1947).

The evident purpose of the statute *sub judice* is to enable indigent prisoners to seek judicial relief with maximum facility, with minimum expense to the State, and in a manner responsive to the State's policy of discouraging senseless or abusive appeals. In this context, the allegations of the statute's inherent discriminatory aspects must fail. There is a clear rationale supporting the State's treatment of the unsuccessful nonindigent appellant vis-a-vis his indigent counterpart. As previously noted, there are a plethora of individuals, neither indigent nor affluent, who are subjected uniformly to the taxation of court costs in the event of unsuccessful litigation. In all too many instances, these burdens can be oppressive. There is no way, however, for a state, in this non-utopian world, to erradicate poverty or to provide ideal economic equality among persons. As stated by Judge Harlan in his dissent in *Douglas* v. *California*, 372 U. S. 353, 361, 362 (1963):

> "Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the State may not classify as crimes acts which the poor are more likely to commit than are the rich. And surely, there would be no basis for attacking a state law which provided benefits for the needy simply because those benefits fell short of the goods or services that others could purchase for themselves."

There may be many situations in which the economic burden of litigation to a nonindigent, who is confronted with the payment for all costs and expense of litigation which may be inclusive of filing fees, attorneys' fees, investigations, printing, etc., are substantially greater than that visited upon an indigent prisoner receiving institutional wages who has no outside financial obligations or responsibilities and who pays only for the cost of a transcript after his appeal. Thus, it is neither empirically nor conceptually true that the risks of appeal which must be weighed by an indigent prisoner receiving institutional earnings and the vast majority of nonindigent defendants are appreciably different. In short, the requirement that a prisoner previously furnished a transcript free of charge reimburse the cost thereof from any of his institutional earnings, does not constitute invidious or unjustified discrimination in relation to nonindigent, unsuccessful appellants.

The assertion that there is invidious discrimination created by the New Jersey statute with regard to an unsuccessful indigent prisoner who has been released from prison before reimbursement is devoid of merit. This contention fails to appreciate the policy of the State of New Jersey that institutional earnings are but one aspect of the administration of the state's penal system. As previously demonstrated, the state is not obligated in the first instance to give its prisoners any remuneration. Moreover, any compensation which is recognized need not be in cash. It may take the form of time-credit on the sentence and may result in a shortening or remission of sentence. It is for the state to determine, as a matter of internal policy, whether the rehabilitation of a prisoner and his return to normal existence in society, and the interest of the pub-

lic in achieving such results, are better served by not assessing prisoners for transcript costs, especially where such prisoners have manifested by their good behavior that they deserve parole.

The State's exception for indigents convicted of capital offenses is based upon sound considerations. The extreme gravity of capital cases *per se* supports the State's determination to exclude prisoners so convicted from the reimbursement statutes.

> "Nor does the equal protection of the laws deny a State the right to make classifications in law when such classifications are rooted in reason. 'The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws", and laws are not abstract propositions.' *Tigner* v. *Texas*, 310 U. S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1124. Since capital offenses are *sui generis*, a State may take account of the irrevocability of death by allowing appeals in capital cases and not in others." *Griffin* v. *Illinois, supra*, 351 U. S. at 21. (Frankfurter, J., concurring).

The distinction between successful and unsuccessful petitioners is equally valid. For an indigent prisoner to be successful means that a court of law has determined that he was not rightfully imprisoned because of some procedural or substantive defect in the convicting process. The justice of not compelling successful prisoners to reimburse the State which had imprisoned him illegally need not be articulated. See Point I, *supra; cf. Snowden* v. *Hughes*, 321 U. S. 1 (1943).

In sum, the fact that the reimbursement statute singles out unsuccessful appellants who have received transcripts free of charge and who receive institutional earnings represents a valid classification in light of the nature of the earnings attached and the goals of the statute.

B

The appellant next challenges the State's application of the statute on the ground that several unsuccessful indigent appellants from Essex and other counties are not presently being subjected to reimbursement, and at least one successful indigent appellant was paroled without being subjected to reimbursement (Ab20). The Court should note the mechanics of reimbursement in order to properly consider this challenge. Initially, the County Treasurer must ascertain from the County Prosecutor whether the appeal of a defendant, previously furnished a free transcript, was unsuccessful. He then must notify the penal institution concerned of the expenses incurred, whereupon the institution undertakes to reimburse the County from any institutional earnings of the unsuccessful prisoner. The record does not show that the several instances of noncompliance by the officials involved were caused either at the county or the institutional level. Further, the record does not indicate fully the reasons for the noncompliance. Insofar as Essex County (which has the responsibility with respect to appellant's obligation to reimburse) is concerned, only 3 prisoners received allegedly preferential treatement. Two of these prisoners were still undertaking further appeals (R34). Moreover, appellant does not include himself in this list of allegedly favored prisoners in spite of the fact that he has not been subjected to the reimbursement provisions with respect to the prosecution

of his first appeal involving his 1959 conviction. The other prisoners from various other counties, and there are relatively few of them, may not have been subjected to the reimbursement obligation for a variety of reasons, none of which bespeaks of purposeful or invidious discrimination. The actions may have been attributable to some tardiness on the part of the prosecutor in furnishing information or some delay or laxity in the County office, or delays or misdirection of mail, or simply clerical errors or oversights. In this vein, appellant's complaint that he had possession of his transcript for only about one month (Ab21), is picayune. There is no suggestion that the transcript would not readily be made available to appellant if he had need for it. The State should be entitled to retain the transcript until it has been paid for, provided the appellant may have access to it in the event of further appeals. At any rate, there can be no intimation that the State's retention of the transcript constituted any evidence of discrimination being practiced against the appellant.

The point is that isolated instances of noncompliance do not render invalid a state-wide statutorily defined policy. *Cf. The Right to Nondiscriminatory Enforcement of the State Penal Laws*, 61 Columbia L. Rev. 1103 (1961). This Court has recognized "the necessity of showing systematic or intentional discrimination" as proof that a state statute is discriminatorily applied. *Edelman* v. *California*, 344 U. S. 357 (1953).

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection

> unless there is shown to be present in it an element of intentional or purposeful discrimination . . . But a discriminatory purpose is not presumed, *Tarrance* v. *Florida*, 188 U. S. 519, 520; . . . there must be a showing of a 'clear and intentional discrimination,' *Gundling* v. *Chicago*, 177 U. S. 183, 186; . . ." *Snowden* v. *Hughes, supra*, 321 U. S. at 8.

Isolated instances of selective enforcement of the reimbursement statute, without more, would not amount to a violation of appellant's constitutional rights. In *Oyler* v. *Boles*, 368 U. S. 448 (1961) the petitioners were convicted under West Virginia's habitual criminal statute. They alleged, *inter alia*, that the state failed to convict many others who were equally subject to its provisions. In rejecting this contention, the Court noted "* * * that it is not stated whether the failure to proceed against other three-time offenders was due to lack of knowledge of the prior offenses on the part of the prosecutors or was the result of a deliberate policy of proceeding only in a certain class of cases or against specific persons." *Ibid.* at 368 U. S. 456. It was ruled that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Id.* See also, *Moss* v. *Hornig*, 314 F. 2d 89 (2d Cir. 1963).

Appellant's innuendo that the State of New Jersey has evinced an arbitrary and invidious attitude in the enforcement of the reimbursement provision of the New Jersey statute is misplaced. The New Jersey Court has been especially sensitive and responsive to the problem of protecting fully the constitutional rights of indigents in their pursuit of judicial relief from criminal convictions. In *State* v. *Welch*, 46 N. J. 57, 214 A. 2d 857 (1957), a post-conviction

proceeding was instituted by Welch in 1964 to vacate or reverse his 1949 conviction of first degree murder under which he had been sentenced to life imprisonment. It appeared that Welch had filed a timely notice of appeal from his conviction. Under the then prevailing practice, although he had a right of appeal (N. J. Const., Art. VI, Sec. V, par. 1(c); Rule 1:2-1(c); *Midler* v. *Heinowitz*, 10 N. J. 123, 89 A. 2d 458 (1952); *State* v. *Cynkowski*, 10 N. J. 571, 575, 92 A. 2d 782 (1952)), an indigent defendant not under the death penalty was not entitled as of right to a free transcript. The basis for his appeal was trial error and it was conceded that in order to present this question, a transcript of the testimony was essential. Welch's efforts to obtain a transcript by a special rule of the Supreme Court were denied without any recited reasons. Thereafter, Welch's appeal was dismissed for lack of prosecution. The petitioner asserted that by reason of the State's failure to furnish him with a transcript of the trial testimony and the consequent dismissal of his appeal, he was prevented from obtaining appellate review. At the time his 1964 petition was brought, the stenographic notes of the trial had been destroyed. The New Jersey Supreme Court granted the petitioner's application for relief and reversed his conviction and remanded the matter for a new trial. It elected not to follow the ruling of *Norwell* v. *State of Illinois*, 373 U. S. 420 (1963) which refused to apply *Griffin* retroactively where the petitioner had not taken steps to perfect his appeal. The New Jersey Court stated:

> "Judicial refusal of that relief must now be regarded as constituting invidious discrimination under *Griffin* v. *People of State of Illinois*, and as an unconstitutional deprivation of his right of appeal under the due process and equal protection clauses of the

Fourteenth Amendment. As *Griffin* teaches, justice is not equal when the wealthy can obtain adequate appellate review and the destitute who cannot afford to buy the record are remediless. Moreover, *Eskridge* v. *Washington State Board* makes plain that Griffin is to be applied retroactively. Thus we should look at the order of this Court denying petitioner's *in forma pauperis* application for the transcript as if *Griffin* had already been decided. Doing so, we must conclude Welch's right of appeal was denied him by judicial action." 46 N. J. at 72, 214 A. 2d at 865.

Under all of the circumstances, it is respectfully urged that the New Jersey statute, L. 1956, c. 134, §1 *et seq.*, N.J.S. 2A:152-17 *et seq.*, and particularly the reimbursement provision thereof, does not constitute in its overall operative effect and in its particular application to this appellant, discriminatory action on the part of the State or its political subdivision contrary to the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the New Jersey statute, L. 1956, c. 134, §1 *et seq.*, N.J.S. 2A:152-17 *et seq.*, is valid and constitutional in all respects, and the decision of the court below should be affirmed.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Appellees Yeager and Dempsky.

ALAN B. HANDLER,
First Assistant Attorney General
Of Counsel and on the Brief.

EUGENE T. URBANIAK,
Deputy Attorney General,
Of Counsel.

NICHOLAS T. FERNICOLA,
Essex County Counsel,
Attorney for Appellee Lerner.

WILLIAM J. STRAUB,
Assistant County Counsel,
Of Counsel.